SMU | Dedman School of Law

SMU Law Review

Volume 8 | Issue 4 Article 7

1954

# Recent Case Notes

Eddie Smith

William A. Nobles

Lewis T. Sweet Jr.

Robert K. Pace

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

Eddie Smith, et al., *Recent Case Notes*, 8 Sw L.J. 461 (1954)
https://scholar.smu.edu/smulr/vol8/iss4/7

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

# RECENT CASE NOTES

## ACCOUNTANTS—LIMITATIONS ON NON-LAWYER TAX PRACTITIONER—WHAT CONSTITUTES "PRACTICE OF LAW"

Plaintiff, a non-lawyer certified public accountant, prepared defendant's tax returns for the years 1947 through 1950. In 1948 a large deduction was taken which produced a net loss, whereupon plaintiff filed for defendant a claim for "carry back" deduction which was granted. The Commissioner contested the treatment, claiming that it was not a loss "attributable to the operation of a trade or business" of defendant, hence not susceptible of "carry back" treatment. After spending five days of case preparation in the county law library, plaintiff countered the Commissioner's contention by citing numerous cases and buttressing his arguments with a "review of over one hundred cases" on the point of law involved. As a result of plaintiff's services, the proposed assessment was reduced from $6,280 to $200. Defendant refused to pay plaintiff's fee of $2,000 on the grounds that the latter had unlawfully practical law. On appeal from a judgment in plaintiff's favor in the Municipal Court of Los Angeles, *held,* reversed and remanded. *Agran v. Shapiro,* 273 P. 2d 619, (App. Dept. Sup. Ct. L. A. County, Calif., 1954).

This is not the first time the courts have considered whether an accountant performing tax services is practicing law. From the position taken in *Gardner v. Conway,* 234 Minn. 468, 48 N.W. 2d 788 (1951), various definitions of the "practice of law" in tax matters have developed. In *In re Bernard Bercu,* 299 N.Y. 728, 87 N.E. 2d 451 (1949), "giving legal opinions in relation to tax laws . . . for compensation" was held to be practicing law. *Lowell Bar Ass'n v. Loeb,* 315 Mass. 176, 52 N.E. 2d 27 (1943), pointed out that "the drafting of documents merely incidental to work of a distinct occupation is not the 'practice of law,' though the documents have legal consequences." The *Agran* case rejected

this "incidental" test. *Chicago Bar Ass'n v. United Taxpayers of America,* 312 Ill. App. 243, 38 N.E. 2d 349 (1941), suggested that the "practice of law" is the "procuring of an agreement . . . (for consideration) . . . enabling . . . (one) . . . to control the negotiations and the litigation that might follow" if the negotiations fail. Perhaps the best definition was hinted at in the principal case, to-wit: If the law on the point is relatively clear, the layman would not be "practicing law." Thus, if a "reasonably intelligent layman (certified public accountant) who is reasonably familiar with similar transactions" could see a "difficult or doubtful question of law" involved, there would be a "practice of law." As to whether tax law practice is governed exclusively by rules of United States Courts and Departments, see *Petition of Kearney,* .....Fla....., 63 So. 2d 630 (1953).

The *Agran* case went further than previous cases in considering the effect of certain administrative regulations. 31 CODE FED. REGS. (1949), subtitle A, § 10.3 (a) (1) (ii), permits certified public accountants to represent clients before the Treasury Department and its branches. But § 10.2(f) states "that nothing in the regulations in this part shall be construed as authorizing . . . (non-lawyers) . . . to practice law." Thus the *Agran* case supplied the initial decision on this particular question: Do the Treasury Regulations have the effect of declaring that services performed by an enrolled agent on federal income tax matters are free from state restrictions as to the "practice of law"? The court decided that no such purpose or effect could be ascribed to the Regulations. It might be contended against the above interpretation that the Regulations could not have intended to grant representative capacity to certified public accountants in one section and then, in another, to deprive them, in reality, of the power to serve in any useful representative capacity. Thus it might be further contended that the first restrictions of § 10.2(f), by specific enumeration, embraced, by the principle of *noscitur a sociis,* all that was to be included in the general restriction of the last clause of that section

which applies to the "practice of law." However, unless public policy added strong support to this interpretation, it seems a bit strained in view of the plain meaning of the words. The *noscitur a sociis* principle wavers in the presence of the *"And provided further"* introduction to the last restriction in § 10.2(f).

A possible solution to this problem of "practicing law" is for the certified public accountant to prepare his client's tax return (or other tax papers) the same way he would if no restriction concerning the practice of law were imposed upon him. However, with the copy which goes to the client, and also with that retained for the accountant's own files (but not with the Director's copy), he could attach a statement pointing out the transactions, if any, on which a controversial or difficult question of law is involved, and state that in his non-legal opinion, it is correctly treated in the return. His fee probably should not include charges for time spent in research on difficult points beyond that customarily devoted to simpler issues of law. This would not deprive the accountant of any functions which are legitimately his, and would specifically renounce any intention of practicing law. The question arises whether any act which is otherwise a practice of law would cease to be such merely by labelling it. Such a transmutation seems at first so facile as to be foreign to any type of legal implementation. However, "the development of any practical criterion . . . (as to what constitutes practicing law) . . . as well as its subsequent application, must be closely related to the purpose for which lawyers are licensed as the exclusive occupants of their field. That purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications." *Gardner v. Conway, supra.* It seems that a statement calling the taxpayers attention to any difficult question is tantamount, so far as the latter's protection is concerned, to a flat refusal to consider difficult questions. The ultimate effect of this solution would be to prevent forfeiture of true accounting fees where a difficult point of law

is incidental to the services, to prevent charges by accountants for rendering additional service on difficult points of law, and to inform taxpayers where legal services are needed.

*Eddie Smith.*

## CIVIL PROCEDURE—SEVERANCE—FAILURE OF ORDER GRANTING SEVERANCE TO INCLUDE NAMES OF PARTIES

Suit for divorce, in which wife joined an action to set aside a conveyance made by her husband and his partner to the Permian Oil Corporation. Plaintiff claimed that the deed to the corporation was made solely to defraud her of community property rights. The corporation moved for a separate trial of the issues between itself and plaintiff as authorized by Rule 174(b) of the TEXAS RULES OF CIVIL PROCEDURE (Vernon, 1948). This motion was granted and a separate trial was had wherein judgment was rendered for the defendant corporation. The order of the District Court granting severance failed to include the names of the husband and his partner. Plaintiff appealed from the judgment in the severed cause on grounds that as the order granting severance failed to include the names of "necessary and indispensable" parties to the suit, the court was without jurisdiction to proceed. Without citing authority, the court held that the order granting a separate trial of the issues between plaintiff and the Permian Oil Corporation carried with it by implication all necessary and indispensable parties to the suit who were subject to the jurisdiction of the court in the case as originally filed. *Watson v. Watson,* 270 S.W. 2d 298 (Tex. Civ. App. 1954).

Rule 174(b) of the TEXAS RULES OF CIVIL PROCEDURE is adopted unchanged from Federal Rule 42(b) which allows the court to order separate trials of claims and issues "in furtherance of convenience or to avoid prejudice." FED. R. CIV. P. 42(b). It is

manifest in the decisions following the promulgation of the rule that it is primarily a rule of convenience, and that the courts are given broad discretion in its application. *McGee v. McGee*, 237 S.W. 2d 778 (Tex. Civ. App. 1950) *error ref. n.r.e.*

The controlling reasons for the severance of separate counts or causes of action are the doing of justice, avoiding of prejudice, and furtherance of convenience. *Utilities National Gas Corp. v. Hill*, 239 S.W. 2d 431 (Tex. Civ. App. 1951) *error ref. n.r.e.* The court, in its discretion, may order a severance for convenience only, or may sever for all purposes. The former is interlocutory and a judgment in regard to the severed issues is not final and appealable. *Wilson v. Ammann and Jordan*, 163 S. W. 2d 660 (Tex. Civ. App. 1942) *error dism.* A severance for all purposes, however, authorizes the court to enter final judgment in the severed cause without making a final disposition of all of the issues raised by the original suit. *Moran v. Midland Farms Co.*, 282 S.W. 608 (Tex. Civ. App. 1926). The court in the instant case treated the severance as a severance for all purposes and allowed appeal from the judgment in the severed cause.

No complaint is made in the principal case as to the action of the court in granting severance. It is said, however, that the failure of the order to include the names of necessary and indispensable parties deprived the court of jurisdiction over those parties and thereby precluded the rendition of a valid judgment.

An indispensable party is a person who has an interest of such nature in the controversy that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shell Development Co. v. Universal Oil Products Co.*, 157 F. 2d 421 (3rd Cir. 1946). This definition as announced in federal decisions has been adopted with approval by the Texas courts. See *Simmons v. Wilson*, 216 S.W. 2d 847 (Tex. Civ. App. 1949). However, Texas courts have

defined "necessary parties" in substantially the same terms. See *Walsh v. Walsh*, 255 S.W. 2d 240 (Tex. Civ. App. 1952). The courts have consistently failed to make a distinction between the two classes of parties. Thus the statement is frequently found that a valid judgment cannot be rendered in the absence of a party who is necessary to the suit. This is not a correct statement of the rule, and has resulted in considerable confusion among the case law. A valid decree may be rendered although a necessary party under Rule 39(a) of the TEXAS RULES OF CIVIL PROCEDURE may be absent. *Hicks v. Southwestern Settlement & Development Corp.*, 188 S.W. 2d 915 (Tex. Civ. App. 1945) *ref w.m.* However, the lack of an indispensable party would render such judgment void. See Frumer, "Mutiple Parties and Claims in Texas," 6 Sw. L.J. 135 (1952).

In the instant case, the court held that as the missing parties were parties to the original action as filed by plaintiff, they remained parties after severance. The fact that the order of severance failed to expressly name the husband and his partner was held not to affect the jurisdiction of the person which attached with their appearance in the original cause. The crux of the problem presented on appeal seemed to be the possible lack of notice to the missing parties that a part of the lawsuit in which they were vitally interested was to be tried separately. The record did not show whether or not the husband and his partner actually appeared in the trial of the issues between plaintiff and defendant corporation. The court, however, correctly reasoned that once the parties were before the court in the original action, the mere technical omission of their names in the order granting severance did not serve to defeat this jurisdiction. If a party has pleaded to an action or otherwise entered an appearance therein, he is before the court for all purposes, and is charged with notice of all subsequent orders and decrees only made therein. *Phillips et ux. v. The Maccabees*, 50 S.W. 2d 478 (Tex. Civ. App. 1932). Being thus charged with notice of the separate trial, the duty rested upon the

missing parties to appear therein and protect their interest. Their failure to meet this duty could in no way operate to invalidate the judgment rendered therein.

*William A. Nobles.*

## CORPORATIONS—VIOLATION OF PRE-EMPTIVE RIGHT AS GROUND FOR CANCELLATION OF STOCK BY DIRECTORS

In April, 1948, the board of directors of defendant corporation adopted a resolution to issue new stock. The new issue was discussed at the annual stockholders' meeting of January, 1949, and the minutes indicate that the stockholders were "satisfied with the explanation given to them," and approved the new issue. Pursuant to the resolution, 511 shares of permanent, non-withdrawable stock were subscribed to, paid for, and stock certificates issued dated December 12, 1952. At the stockholders' meeting of January, 1953, for the first time since 1949, a stockholder inquired about the increase in permanent stock. At the directors meeting in May, 1953, purportedly to vindicate the pre-emptive rights of the stockholders, a resolution was adopted rescinding the action of the directors at the meeting of April, 1948, and cancelling the stock issued pursuant thereto. Plaintiffs were among the purchasers of the new stock issue, and filed suit to set aside the cancellation of stock, permanently to enjoin a special stockholders' meeting called for the purpose of giving pre-emptive rights, and to remove the cloud on the title to their stock.

Held: The corporation cannot now, after all that has transpired, and after the several stockholders' meetings where the subject was discussed, lawfully exercise the power to cancel the shares and order a resale to all the shareholders. Relief sought by plaintiffs granted. *Barsan v. Pioneer Savings & Loan Co.*, 121 N.E. 2d 76 (Ohio App. 1954).

The rationale of the case is not clearly defined, the court just concluding that, all factors considered, the corporation cannot cancel the stock. The court apparently based this conclusion upon the following four factors: (1) since the corporation had authority to issue the stock, the issue was not ultra vires, and there was no harm to the corporation in the issuance; (2) the issuance of the stock, even if attended by irregularities, was not void, and the subscribers could not have set up the violation of pre-emptive rights as a defense to an action to enforce payment on their subscriptions; (3) if there has been a violation of pre-emptive rights, the right of action for redress of the injury belongs to those who were stockholders at the time of the new issue and they have brought no action; (4) in this case, in any event, a right to cancellation of the stock was barred by the laches or estoppel of the corporation or stockholders to assert the invalidity of the stock.

In the opinion, at page 79, the court states the fundamental question in this case: can the directors cancel the stock previously issued as a result of the subscription made pursuant to the resolution of 1948? The only question in this case seems to be the authority of the directors to undo an act which they have previously done which is wrongful, and in contravention of a statute. (Section 1701.40 of the Ohio Revised Code provides that upon the issue of corporate stock for cash, existing stockholders of that class shall have a right to subscribe to the new issue in the proportion their holding bears to the total outstanding stock.) The only reason found by the court for not allowing the cancellation of the stock which appears relevant to this question is the fourth—laches or estoppel.

The question of whether there has been a wrong to the corporation seems irrelevant because the corporation is not suing anyone, nor is anyone suing the directors for a wrong to the corporation. That a subscriber to the new stock would have no defense also appears irrelevant. Commentators have come to the conclusion

"that the so-called pre-emptive right is not a right at all, but a remedy . . . and that unless a situation appeared calling for a remedy and requiring this particular remedy the right should not necessarily be assumed to exist." Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). *A fortiori*, it would seem that there is nothing in the nature of pre-emptive rights which makes the issue of stock in violation thereof void; at the most it is voidable. Pre-emptive rights are for the benefit of the non-acquiring stockholders, and presumably the acquiring stockholders would be estopped in the ordinary case from raising this defense. When the question is viewed in the light as stated above, it also seems irrelevant that the stockholders have not themselves sued to enforce their rights to the stock.

The management of the corporation is reposited in the hands of the directors, and it would seem that they can change their minds as they please, so long as there are no intervening rights of third parties. It has been stated that the directors can rescind or repeal any previous action of the board unless such rescission or repeal would involve a breach of contract or disturb a vested right. *Staats v. Biograph Co.*, 236 F. 454 (2d Cir. 1916). Thus, there would be a question in any case of cancellation as to whether the rights of third parties have intervened. But if there is a violation of pre-emptive rights of such a character that a court of equity would enjoin issuance or cancel an executed issue, third persons should not have a legal basis for objection that the directors have undone their unlawful act without the necessity of judicial coercion. Compare the situation where the corporation in paying a dividend makes the check out in too large an amount or makes it payable to the wrong person. Who would challenge the right of the directors to correct their mistake by stopping payment on the check without waiting for a court order?

Did the vested rights of third persons intervene in this case?

of the new issue, then presumably the directors in 1953 were not redressing an illegal act, and the vested rights of the new stockholders do intervene. Of course, a requisite of waiver of a right is knowledge of the facts creating the right waived. Some of the facts which must be taken into consideration in determining the question of laches, estoppel, or acquiescence are whether the complaining stockholders were present at the meeting at which the new issue was discussed; whether full disclosure of all the facts relevant to the new issue was made at that meeting; whether the stockholders had or should have had knowledge of the facts; whether there was adequate notice given of business to be considered at the meeting. Insufficient or defective notice renders the action taken at the meeting voidable at the instance of those who did not participate. BALLANTINE, CORPORATIONS § 171 (Rev. ed. 1946). As a general rule, objections may be made only by injured stockholders; and notice of meetings, or defects therein, may be waived, cured by ratification, or objections thereto barred by laches or estoppel. Attending and participating in a meeting constitute a waiver. Where all the stockholders of a corporation are estopped, the corporation is likewise estopped. *Kearneysville Creamery Co. v. American Creamery Co.*, 103 W. Va. 259, 137 S. E. 217 (1927). See the annotation at 51 A.L.R. 941 (1927). All stockholders are charged with notice of and bound by what was done at a meeting regularly convened of which they were notified. *Kranich v. Bach*, 209 App. Div. 52, 204 N.Y.S. 320 (1924); *Hinds County v. Natchez, J & C. R. R. Co.*, 85 Miss. 599, 38 S. 189 (1905). The statement of facts by the court is not sufficient to determine the answer to these problems in the principal case.

*Lewis T. Sweet, Jr.*

CORPORATIONS: WHAT CONSTITUTES DOING BUSINESS FOR SERVICE OF PROCESS ON FOREIGN CORPORATION

An Ohio corporation, being sued as a third party defendant, secured an order vacating service of process made on its president while in New York on vacation. The corporation claimed immunity on the ground that it was a foreign corporation not doing business in New York at the time suit was brought. Appellant, a co-defendant, argued that until three years before process was served the appellee Ohio corporation had an agent who maintained an office and telephone in its name. Also approximately four years prior to service the agent had sued in the New York courts using the name of the appellee. The appellee showed that its contract with the agent had ended three years before and that since then it had had no employees or representatives within the State of New York. The appellee did, however, currently maintain a bank account in New York for the purpose of establishing credit standing and for discounting notes received on export matter. Held, Order vacating service affirmed. *Knight v. Stockard S.S. Corp. (W. A. Riddell Corp.)*, 214 F. 2d 727 (2nd Cir. 1954).

Due process under the Federal Constitution requires that a foreign corporation must be doing business within the state of forum to be amenable to process in that jurisdiction. *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8 (1907), *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918). The fact that an official of the foreign corporation is physically present in the state is not sufficient to authorize service. *Goldey v. Morning News*, 156 U.S. 518 (1895). The appellant argued that the appellee was doing business in New York until its contract with its agent expired, and that only a "slight amount of business thereafter done in New York would suffice to keep the appellee present in the state subject to process." Citing: *French v. Gibbs Corp.*, 189 F. 2d 787 (2nd Cir. 1951).

In the *French* case it was held that a corporation would still be present in the state of forum if service was made shortly after the ceasing of business activities and if the liability of the corporation arose out of the events occurring within the state trying to get jurisdiction. There one month had elapsed from the ceasing of corporate activities until service, and this was held satisfactory to uphold service. *Newmark v. Abeel*, 102 F. Supp. 994 (S.D.N.Y. 1952), involved a similar situation in which there were two years from the time of suspension of business activities until service and that length of time was held to be too long to satisfy the rule. In the *Knight* case there were three years between the diminishing of activities in the state and service of process. Following previous decisions this would seem an unreasonable length of time to hold the corporation liable to service of process on the basis of its past activities.

Thus if process is to be sustained in the principal case, it must be on the basis of present business activity. The test which determines whether or not a corporation is doing business in a state so as to be subject to the jurisdiction of its courts is whether its activities within the state are casual and occasional or systematic and regular. 18 FLETCHER, CORPORATIONS § 8713 (Perm. Ed. 1933). This test is not easily applied and a result the courts have consistently recognized that what constitutes doing business is peculiarly dependent on the facts of the particular case and no inflexible formula can be applied governing every situation. *Oyler v. J. P. Seebury Corp.*, 29 F. Supp. 927 (N.D. Tex. 1939), *Jeter v. Austin Trailer Equipment Co.*, 256 P. 2d 130 (Cal. 1930), *New v. Robinson-Houchin Optical Co.*, 357 Pa. 47, 53 A. 2d 79 (1947).

The United States Court of Appeals in this case held that the maintenance of a bank account for credit purposes was not sufficient business activity to compel the appellee to respond to suit in New York State. Although the court cited no cases, this decision

is well supported by authority. Thus in an early case, a Colorado corporation which maintained an office for registering stock transfers, held directors meetings, and kept a bank account in New York was held not to be doing business for the purpose of service of process in that state. *Honeyman v. Colorado Fuel & Iron Co.*, 133 F. 96 (C.C.E.D.N.Y. 1904), also see *Landaas v. Canister Co.*, 69 F. Supp. 835 (S.D.N.Y. 1946), *Lichtenberg v. Bullis School, Inc.*, 68 A. 2d 586 (D. C. 1949).

It is interesting to note that the PROPOSED TEXAS CORPORATION ACT deals specifically with this problem. The federal decisions set up a minimum standard of business activity which must be carried on in order to meet the Constitutional requirement of due process. Any state may set its own standard as to what constitutes doing business as long as it is not lower than the federal standard. The PROPOSED TEXAS CORPORATION ACT (H. B. No. 27, 53rd Leg., Reg. Session (1953)) in Art. 8.01 (B) enumerates a list of activities which shall not constitute doing business. Included among these activities is that of maintaining a bank account. As we have seen from the prior holdings this statute, if passed, would make no change in the common law but would only be a codification of those holdings.

*Robert K. Pace.*

## CRIMINAL LAW: DOES PLEA OF GUILTY IN STATE COURT AND SUBSEQUENT CONVICTION IN FEDERAL COURT FOR THE SAME ACT CONSTITUTE DOUBLE JEOPARDY?

Appellant was indicted for burglary and receipt of stolen goods in Pennsylvania state court in 1950. Two federal indictments were returned in 1951 charging him with theft of goods from interstate commerce and the possession thereof under Title 18 U.S.C. § 659, based on the *same acts* as were the state indictments. He pleaded guilty first in the state court and subsequently in the federal court, but the federal court acted first and sentenced him to imprisonment for nine years on each charge. Appellant seeks reversal in the United States court of appeals, relying inter alia on a provision of the federal statute: "A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts." Held: conviction sustained. *United States v. Scarlata,* 214 F. 2d 807 (3rd Cir. 1954).

The court found the argument of double jeopardy without merit, saying, "Although a plea of guilty may be a conviction in the same sense in which a jury verdict is a conviction, a plea of guilty is not a *judgment* of conviction." A *judgment* of conviction is rendered only by the court, and some sort of court action is required before the later prosecution would be barred. This result is in accord with *In re Cedar,* 269 N.Y. Supp. 733, 240 App. Div. 182 (1934), wherein a judgment of conviction is defined as the sentence of a court entered into the minutes of that court, consisting of facts judicially ascertained and recorded. The common law, sans "judgment of conviction," is contra. A plea of guilty to an indictment with entry on the record is jeopardy. *State v. Randolph,* 61 Idaho 456, 102 P. 2d 913 (1940). From the moment an accused is placed on trial on his plea before a duly sworn jury, jeopardy attaches, and same may be interposed on any subsequent trial for the same offense. A plea of guilty is legally the

same as a verdict of guilty. 2 WHARTON, CRIMINAL EVIDENCE 1478 (11th ed. 1935).

The reasoning of the main case, however, turns on the construction of the seemingly innocuous phrase, "judgment of conviction." Possibly the scope of the decision should be narrowly limited to federal statutes of similar import. The statute certainly marks a distinct departure from the Constitutional doctrine of separate sovereignty of state and federal governments. Assuming jeopardy in the state court, that jeopardy formerly was no defense to a subsequent prosecution by the federal government for the same act which violated both state and federal law, for the same source of conduct may be an offense against both the state and federal governments as separate sovereigns. *United States v. Lanza,* 260 U.S. 377 (1922).

Seemingly the court could have decided the principal case on other grounds. The immunity from second jeopardy granted by the Constitution is a personal privilege which the accused may waive, expressly or impliedly. So an accused waives his Constitutional right to claim double jeopardy by pleading guilty. *Bracey v. Zerbst,* 93 F. 2d 8 (10th Cir. 1937). See also *Berg v. United States,* 176 F. 2d 122 (9th Cir. 1949), cert. denied, 338 U.S. 876.

Although on the facts of the principal case subsequent prosecution was not barred since there had been no "judgment of conviction" in the state court, the strong intimation of the court is that it is acceding to the Congressional intent to abolish the separate sovereignty doctrine in the federal courts. But in the absence of state statute or state constitutional provision to the contrary, the state court still can successfully prosecute the defendant on his guilty plea, whether he was convicted or acquitted in the federal court. Could Congress have intended such a result? Might not this lead to collusion between state and federal prosecutors? Certainly the constitutional difficulties that Congress would meet

in attempting to bind both state and federal courts to previous judgments of conviction or acquittal would be insuperable. The solution might be for the legislatures of the various states to pass similar statutes barring prosecution in the state courts after conviction or acquittal in the federal courts. Some states have enacted statutes of like import. See for example, Section 2290, OKLA. COMP. STAT. § 2290 (1921).

*Lee Williams.*

INCOME TAX—CONGRESSIONAL SUBPOENA DUCES TECUM—FAILURE OF WITNESS TO BRING FORTH COPIES CONSTITUTED CONTEMPT OF CONGRESS

Defendant, as a witness before a Senate investigating subcommittee, failed to produce his retained copies of specified income tax returns in response to a subpoena *duces tecum* issued by the subcommittee. In a prosecution for contempt of Congress, the federal district court held defendant guilty. *United States v. O'Mara,* 122 F. Supp. 399 (D.D.C. 1954).

Income tax returns filed with the Commissioner constitute public records; however, examination of the returns may only take place on Presidential order and under rules prescribed by the Secretary with the President's approval. INT. REV. CODE § 55(a)(1). By interpreting the applicable statutory section, Judge Holtzoff determined, in a debatable decision, that the limited statutory privilege does not include the taxpayer's own copies.

The opinion referred to the oft-cited case, *Connecticut Importing Co. v. Continental Distilling Corp.,* 1 F.R.D. 190 (D. Conn. 1940). In a civil action the court ruled the defendant was entitled to inspect the plaintiff's retained copies of income tax returns. These retained copies constituted communications from

the taxpayer to the government, but nevertheless "are without privilege either at common law or under statute." Because the retained copies lie outside the limited statutory privilege, their status is similar to that of the other items of admissible evidence.

This view is in accord with the prevailing majority view in civil proceedings. The applicable section of the code only covers disclosure by governmental officers and employees having control of original documents; copies of returns remaining in the hands of taxpayers are not privileged. *Samish v. Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938). One court has stated the proposition that where the taxpayer has no copies, he can be required to inspect his original returns in the Bureau office and then to produce the required copies. FED. R. CIV. P. 34, *Reeves v. Pennsylvania R. Co.*, 80 F. Supp. 107 (D. Del. 1948). Copies of income tax returns are held not privileged by most courts. *Nola Electric, Inc. v. Reilly*, 11 F.R.D. 103 (S.D.N.Y. 1950).

There is a minority view that retained copies can not be introduced as evidence. An early opinion found reversible error for admitting as evidence unsigned copies of federal income tax returns upon the ground that their reception violated the "best-evidence" rule. Before copies are admissible is must be proven that the original documents can not be produced; this could not be shown as originals are in governmental custody and available when needed. *Corliss v. United States*, 7 F. 2d 455 (8th Cir. 1925). The leading minority opinion holds income tax returns are, in private civil actions, confidential information between the taxpayer and the government and not open to inspection; other district court rulings requiring production of returns were stated not to bind this court. *O'Connell v. Olsen and Ugelstadt*, 10 F.R.D. 142 (N.D. Ohio 1949).

*United States v. O'Mara* is an opinion of first impression in that a Congressional subcommittee is the organ subpoenaing copies of income tax returns. With the majority of our courts holding that

these documents can be subpoenaed in civil litigation, the court drew an analogy to civil action results in allowing the returns to be subpoenaed. The power of Congress to punish a private citizen for contempt when such individual fails to produce the requested pertinent documents was available. 52 STAT. 942, 2 U.S.C. 192 (1938); *Jurney v. MacCracken,* 294 U. S. 125 (1925). The predominate view in civil litigation is well supported by sound reasoning. Subpoenaing copies is the only feasible way in which returns may be produced to meet the demands of the particular suit. However under § 55(d)(1) of the INTERNAL REVENUE CODE, Congressional committees are given another manner in which such returns may be procured. On securing an Executive Order from the President, an authorized investigation committee may inspect the original returns in the Commissioner's office. Three such orders were issued in 1952. Because this suitable statutory method is provided, it is submitted that the court should have followed the "best-evidence" rule and required Congressional committees to obtain the original filed returns instead of allowing the individual taxpayer's copies to be subpoenaed. Such a course of action would, in addition to complying with the "best-evidence" rule, avoid any possible misunderstanding and ill-will between the witness and the Congressional committee.

*Larry E. Golman.*

## CAPTIVE AUDIENCE DOCTRINE—NO SOLICITATION RULE—EMPLOYER'S FREEDOM OF SPEECH

The management of a retail department store made speeches to its employees during working hours on the subject of a forthcoming union election. All of the employees left the store by one exit. The union hall was located one and a half blocks from the store. The store applied a no solicitation rule at all times. A request by the union for equal speaking time was denied on the basis of the no solicitation rule. The speeches of the management had been found to contain no threat of reprisal or promise of benefit so as to take them out of the protection of Section 8(c) of the NATIONAL LABOR RELATIONS ACT. Held, the speeches of the management did not constitute an unfair labor practice though coupled with a refusal of equal speaking time to the union. *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954).

The Board first held that a captive audience was unlawful per se. *Clark Brothers*, 70 N.L.R.B. 802 (1946). After Congress, expressly condemning the *Clark* case, amended the NLRA with Section 8(c), the Board reversed itself. *The Babcock and Wilcox Co.*, 77 N.L.R.B. 577 (1948). Later the Board reverted in part to its prior ruling and held that when a broad rule against solicitation is enforced an employer cannot discriminatorily violate it. *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).

A no solictation rule was held unlawful when applicable to free time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). But a no solicitation rule applicable to free time was upheld in the case of department stores due to the nature of the business. *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948). It was the combination of such a broad but privileged no solicitation rule and a refusal to the union of equal facilities on which the decision in the *Bonwit Teller* case was based. The principle of equal facilities

was extended to cases in which there was no rule against solicitation. *Metropolitan Auto Parts, Inc.*, 102 N.L.R.B. 1634 (1953). But the Board has held since the principal case that the employer may deny equal facilities even though he enforces a rule against union solicitation, provided that the rule does not apply to non-working time. *Livingston Shirt Corp.*, 107 N.L.R.B. NO. 109 (Dec. 17, 1953).

In allowing the employer in the principal case to enforce a no solicitation rule at all times without granting the union an equal opportunity to address the employees the Circuit Court laid special emphasis on the ease with which the union might contact the employees off the premises and on the employer's right to freedom of speech, guaranteed under the Constitution and doubly emphasized in Section 8 (c). But the Board in the *Livingston* case limited the employer's right to enforce a no solicitation rule to working hours only without consideration of the opportunity the union might have in the individual case for contacting the employees off the premises. The decision of the Circuit Court thus further broadens the rule as modified by the Board as to the permissible extent of a no solictation rule in the absence of an allowance of equal facilities.

*Bill Masterson.*

LABOR LAW: IN CERTAIN EXCEPTED SITUATIONS STATES MAY STILL ASSERT THEIR JURISDICTION OVER LABOR CONTROVERSIES FALLING WITHIN THE JURISDICTION OF THE N.L.R.B.

Petitioner was engaged in interstate commerce and therefore within the provisions of the Taft-Hartley and Wagner Acts, U.S.C. Title 29, § 141 *et seq.* He sought an injunction against the defendant union to restrain picketing of his place of business. The picketing had been accompanied by violence, and there was the threat of that violence being continued by the union. Defendant union answered that the petitioner was without a cause of action in the state court due to the construction of the Wagner and Taft-Hartley Acts that had been promulgated by the U. S. Supreme Court in *Garner et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL) et al.*, 346 U. S. 485 (1953), to the effect that Congress had precluded the states from asserting their jurisdiction over these matters and had given the power of investigation, hearing, and decision exclusively to the National Labor Relations Board. The court granted the injunction against the union and, pointed out that while the now famous *Garner* case did preclude the states from asserting their jurisdiction in labor controversies involving businesses engaged in interstate commerce, it did not prevent the states from exercising their police power to enjoin such picketing when it was accompanied by violence or a continuing threat of violence. *Douglas Public Service Corp. et al. v. Gaspard et al.*, 74 So. 2d 182 (La. 1954).

In writing the unanimous opinion in the *Garner* case, the late Mr. Justice Jackson made provision for this exception when he stated:

> We have held that the state may still exercise "its historic powers over such traditionally local matters as public safety . . . "

When ordinary peaceful picketing is used, then by the rule of the *Garner* case, the complainant should take his petition to the

National Labor Relations Board for its exclusive consideration and decision. *Building Trades Council et al. v. Kinard Construction Co.*, 346 U. S. 933 (1954), *Your Food Stores of Santa Fe Inc. v. Retail Clerks Local No. 1565*, 121 F. Supp. 339 (D.N. M. 1954). However, when violence or a threat of violence to human life and property accompanies these controversies, the various states are not precluded from asserting their police power to protect the public and to prevent the occurrence of the violence. *Irving Subway Grating Inc. v. Silverman et al.*, 117 F. Supp. 671, (E.D.N.Y. 1953), *Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U. S. 740 (1942).

The fundamental reasoning underlying this exception to the rule of the *Garner* case is found perhaps in the basic premise, that even though Congress desires that there be uniformity in the law of labor relations and that such can only be secured by granting exclusive jurisdiction in the field, this interest must yield to the duty of the states to protect their citizens from harm and property destruction. The proposition that the states either cannot or should not be precluded from asserting their police power in such situations is given some support by *Morgan's S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455 (1886), which held a state quarantine law valid as a protection of its citizens' health irrespective of the exclusive power of Congress to regulate interstate commerce.

*Joe H. McCracken III.*

TRUSTS—SUPERVISION BY THE COURTS AND DISCRETIONARY POWERS OF THE TRUSTEE

Testamentary trustees filed a bill in equity to secure a decree declaring that the trustees had the power to bind ultimate remaindermen of the trust estates and an insane life tenant to a twenty-five year lease that would extend beyond the probable terms of the trusts. The ultimate remaindermen consisted of infants. An alternative prayer was entered asking that the court ratify and approve the action of the trustees in entering into the lease agreement for the above term of years. In reversing the court of appeals and affirming the Chancellor, the Supreme Court stated that the trustees did not have the authority to make the lease without the approval of the court. However, a term of twenty-five years was approved as the most desirable period for the best interests of all. The court rejected the specific lease in question, preferring a renewal lease not made by the trustees. The Chancellor was directed to order the trustees to repudiate the lease agreement made by them and execute the renewal lease approved by the court. *Nashville Trust Company et al. v. Lebeck*, .....Tenn....., 270 S.W. 2d 470 (1954) (3-2 decision).

It appears that the majority was controlled largely by the fact that the beneficiaries were infants. The court pointed out the failure of the court of appeals to give due consideration to the inherent jurisdiction of the Chancery Court in dealing with the administration of trust estates, especially where the interests of minors and lunatics were concerned. The Chancellor stands in *loco parentis* to infants and lunatics with reference to the disposition of their property and must consider their best interests. He has authority to make a lease contract in some instances, and in this case he acted with only the manifest interest of the parties in mind. The court stated the broad principle that "a court of equity will watch over the administration and execution of a trust and see that the interest of all parties is protected, as far as it can be

done consistently with the rules of law and of equity, and fairness to all concerned." The trustees were estopped to deny the court's power to approve of the lease in this case for they had specifically asked for such approval in their alternative prayer.

A strong dissent pointed out that the majority had strayed from the law of Tennessee and from a well established law of trusts. See Note, 8 L.R.A. (n.s.) 398 (1907). The trustees had the discretion to lease the property under the wills creating the trust, and the court should not have substituted its judgment for that of the trustees unless bad faith or a gross and arbitrary abuse of discretion on the part of the trustees was shown. The leading Tennessee case on the point states that a "trustee having the power to exercise discretion will not be interfered with by the court so long as he is acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee." *Smith v. Fleisch*, 4 Tenn. App. 139, 147 (1926). On the point of estoppel the dissent asserts that the majority misconstrued the alternate prayer seeking approval of the *term* of the lease and not approval of the lease itself.

The general rule in this type case is stated in 2 SCOTT, LAW OF TRUSTS § 187 (1939):

> Where discretion is conferred upon the trustee with respect to the exercise of a power, the court will not interfere with him in his exercise or failure to exercise the power so long as he is not guilty of an abuse of his discretion. . . . The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee.

It is doubtful if the well established rule has been abrogated. It appears that this case stands as an exception to the rule and this result will be confined to similar fact situations.

*Frank Rose.*

## WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—ACT OF GOD

Employee was killed while being transported by employer from place of employment to employer-furnished sleeping quarters when a sudden storm upset the truck in which the employee was riding. In action brought by decedent's wife under the workmen's compensation statute, WILLAMS TENNESSEE CODE, § 6851 *et seq.*, trial court allowed recovery. On appeal, held: reversed and petition dismissed. Injuries resulting from act of God compensable only if resulting from danger not common to general public and peculiar to employment or if injury could have been reasonably contemplated by employer at time of hiring. *Jackson v. Clark & Fay, Inc. et al.*, .....Tenn....., 270 S.W. 2d 389 (1954). (3-2 decision).

It was conceded that the plaintiff was in the course of employment at the time of his death; however, the majority of the court felt that the determinative question was whether this injury and resulting death arose "out of his employment." A two-pronged test to determine the "out of his employment" question was used to determine the liability: (1) Was the danger of being injured by a storm while traveling to and from his work in a truck along a public highway a danger peculiar to Jackson's work?, and (2) Could such injury reasonably have been contemplated if it had been thought of at the time of the employment as a risk incident to Jackson's duties?

In answer to the first test, the court relied upon a line of cases based on *In re Employers' Liability Assur. Corporation, Limited. In re McNicol et al. In re Patterson, Wilde & Co.*, 215 Mass. 497, 102 N. E. 697 (1913), holding a causal connection must exist between the conditions under which the work is required to be performed and the resulting injury. In following this tort formula of recovery rather than the normal all inclusive statutory coverage

of the workmen's compensation act, the court seemingly refutes its own holdings that the agreement between employer and employee under this act is in the nature of an insurance contract, *Hughes v. Elliot*, 162 Tenn. 188, 35 S.W. 2d 387 (1930); and that the act is to be construed liberally in the claimant's favor. *Maxwell v. Beck*, 169 Tenn. 315, 87 S.W. 2d 564 (1935); *Brown v. Birmingham*, 173 Tenn. 343, 117 S.W. 2d 739 (1938).

The foreseeability requirement would apply a retroactive test. The court was forced to this position in an attempt to resolve a split in prior cases distinguished on rather weak grounds. See: *Scott v. Shinn*, 171 Tenn. 478, 105 S.W. 2d 105 (1937); *Carter v. Hodges*, 175 Tenn. 96, 132 S.W. 2d 211 (1939). The Tennessee statute itself requires no tests of foreseeability, direct causal connection or proximate cause except in the case of occupational disease (WILLIAM'S TENN. CODE § 6852d) but the application of these principles is felt necessary due to prior decisions. The court specifically points out on the motion for rehearing that a change in the test would have to be brought about by legislative enactment.

The Tennessee act has no specific clause relating to act of God situations. In contrast the Texas act (VERNON'S TEX. REV. CIV. STAT. (1925) art. 8309 § 1) provides recovey only if the duties being peformed by the employee subject him to a greater hazard than ordinarily confronts the general public and states that determination of this is a question of fact for the jury. See further comprehensive note in 16 TEX. L. REV. 130.

The dissent reasoned that such fine distinctions as lay the premise for the majority holding should not govern. If the negligence of the truck driver had caused the injury, recovery would have been allowed as a matter of course. The act of God feature should not be given overriding influence, but rather a determination of "in the course of employment" alone should determine

the result. This dissent cites with approval the following definition of "arising out of employment:" "An injury arises out of employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of employment looked at in any of its aspects." *Caswell's Case,* 305 Mass. 500, 26 N.E. 2d 328, 330 (1940). This latter definition would appear to be the modern rule and more in harmony with the intent of the workmen's compensation statutes.

*Henry Baer.*